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# The Anatomy (or Post Mortem) of a Peculiar Legal Concept in the Italian Company Law: the Separate Fund

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# EUROPEAN Company Law



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# European Company Law

European Company Law (ECL) is published under the aegis of the Centre for European Company Law (CECL), an academic partnership of the Universities of Leiden, Utrecht and Maastricht, the Netherlands ([www.cecl.nl](http://www.cecl.nl)). The purpose of CECL is to further the study of company law by focusing on supranational issues. These include both developments in the EU and on other international levels, as well as comparative law. Leiden University acts as the leading partner in CECL, with Professor Dr. Steef M. Bartman, as coordinating director. ECL aims to be interesting for both practising and academic lawyers in the field of European company law. There are six issues of ECL per year. Two of these (April and October) concentrate on specific topics. The other issues (February, June, August and December) contain articles on various subjects and also include country reports of a general nature, highlighting important developments in a number of EU jurisdictions, as well as columns that offer summaries of recent EU legislation, ECJ case law and of selected articles from various national legal periodicals.

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MESSAGE FROM THE PUBLISHER

Due to the fact that two extended special EUCL issues are scheduled for the second half of this year, one on ‘Accountancy Law Developments in the EU’ and the other on ‘Corporate Social Responsibility’, whose issues will require substantially more pages than a normal issue; the publisher and editors have decided that there will not be an issue in April.

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**Importing Delaware's Fiduciary Duties to South-Eastern European Countries**

The countries of South European Europe are engaged in serious efforts to develop new company laws. However, they still seem to lag behind leading states in company law such as Delaware in the USA and Germany in the European Union. At the same time, with regard to the principles of fiduciary duties, the company laws of these countries are much in line with the law of Delaware, especially due to the heavy impact that American technical assistance has had and continues to have on the drafting of those laws.

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# The Separate Fund: A Peculiar Italian Legal Concept

PIERRE DE GIOIA-CARABELLESE, SENIOR LECTURER IN BUSINESS LAW HERIOT-WATT UNIVERSITY, EDINBURGH, UNITED KINGDOM, & NICOLA CECCHETTO, UNIVERSITA' DI PADOVA\*

## 1. INTRODUCTION

Almost a decade on from Italy's ushering in of new corporate legislation, aimed at a radical reform of the legal structure and economic dynamics of the corporations in that country to a more contemporary configuration and a more international tone, some concepts have been revamped, others have been removed and yet others have been introduced from the outset in the corporate system of that country. The separate fund (the concept which forms the subject matter of this analysis)<sup>1</sup> falls within the ambit of the latter category. The following paragraphs will embark on comprehensive deliberation over the concept of the separate fund, introduced within the Italian jurisprudence close to ten years ago, particularly in light of the empirical attention that it has hitherto managed to attract. By way of an introduction and just to remind one of the necessary background information entailed in the reading of the following notes, it is essential to highlight the timing of that reform, hinged upon a previous act of the Italian Parliament (Law 3 October 2001, No. 266), whose purpose it was to lay down the principles of the new legislation in the matter of corporate law (including therefore that of the specific concept at stake, the separate fund), and followed up eventually by the delegated piece of legislation of the Italian Government (Legislative Decree 17 January 2003, No. 6).<sup>2</sup> This latter legislation has belatedly amended the parts of the Italian civil code<sup>3</sup> (ICC) dedicated to the corporations, in some cases by simply replacing the previous law provisions, while in others – as is the case with

the separate fund, which is a totally new concept – by introducing new provisions from the outset.

That being said, the intention of the Italian parliament, manifested in the goal of the separate fund, was to allow a company to '*set up separate asset dedicated to a specific transaction, with the possibility to issue financial instruments of participation in the same*'; to legislate on adequate forms of publicity; to discipline the regime of responsibilities for the obligations relating to the funds as well as their insolvency.<sup>4</sup> This principle is echoed in the Report of the Law Commission in charge of preparing the actual final text of the reform;<sup>5</sup> in this, it is stated that the concept is rendered prominent by its significant novelty, as it is a means of allowing the company to dedicate (or reserve) part of its own assets to a specific business and that, in so far as, the company concerned is able to achieve a proper separation of assets so that a total autonomy in terms of liabilities is achieved.

## 2. THE CONCEPT OF SEPARATION OF ASSETS IN ITALY: MAIN PROVISIONS

Specifically envisaged for Italian corporations, the essence of the separation of assets lies on the creation of one or more assets each of which is aimed to carry out exclusively a specific business or transaction, among those already vested with the company according to its corporate purpose or object.<sup>6</sup> More specifically, according to Article 2447-*bis* of the ICC:

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1 In this work, the expression 'separation of assets' shall be utilized interchangeably with the 'separate fund', according to the same identical meaning, in both the singular and the plural version.

2 Henceforth also the 'Company Reform'.

3 Henceforth also the 'ICC'.

4 Bankruptcy implications of the 'fund' are merely hinted in this work, across para. 4 and relevant n. 33 *infra*.

5 See Relazione Commissione Mirone (Mirone's Commission Report), named after the academic in charge of leading the group of experts required to produce the final draft legislation.

6 Analysis and discussions on the phenomenon of the separate funds, generally considered, can be read in the following contributions: M Lamandini, 'I Patrimoni "Destinati" nell'EsperienzaSocietaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6' [2003] Rivista delle Società 490,506; P Ferro-Luzzi, 'La Disciplina dei Patrimoni Destinati' [2002] Rivista delle Società 121,138; A Zoppini, 'Autonomia e Separazione del Patrimonio nella Prospettiva dei Patrimoni Separati della Società per Azioni' [2002] Rivista di Diritto Civile 545,575; F Di Sabato, 'Sui Patrimoni Dedicati nella Riforma Societaria' [2002] Le Società 665,666; F Fimmano, 'Il Regime dei Patrimoni Dedicati di S.p.A. tra Imputazione Atipica dei Rapporti e Responsabilità' [2002] Le Società 960,965; GB Portale, 'Dal Capitale Assicurato alle "Tracking Stocks"' [2002] Rivista delle Società 146,169; P Ferro-Luzzi, 'I Patrimoni "Dedicati" e i "Gruppi" nella Riforma Societaria' [2002] Rivista del Notariato 271,277. The latter underlines, in commenting on the separate funds:

"[...] [S]iamo in presenza di una "sub società", di una società' cui si toglie l'atto costitutivo e la si aggancia, in maniera estremamente ambigua, ad una società vera e propria. Secondo me, questa visione, che deriva dal fare capo ciecamente ed acriticamente alla teorica dei patrimoni separati, soprattutto ha il torto di non tener presente che siamo in presenza di un'attività' di impresa." (we are dealing with a [phenomenon of] a "sub-company, of a company which is being deprived of its articles of

A company may [...] constitute one or more funds, each of which is dedicated exclusively to a specific transaction.<sup>7</sup>

The possibility for a company to create a 'separate fund' or also 'separate funds' is not bereft of legal constraints and limits for the reason that, first, from a quantitative point of view, pursuant to Article 2447-bis(2), the fund at stake 'may not be constituted for an amount, as a whole, higher than the percent of the company's net assets'.<sup>8</sup> Second, based on a different limb of the same law provision, the fund cannot be established for the purpose of *carrying out transactions relating to activities which are reserved on the basis of special laws*.<sup>9</sup> Based on the exegesis of Article 2447-ter of the ICC, it can be affirmed that the creation by a company of a fund must undergo a quite laborious procedure, as anyone would justifiably expect it to, given the consequences of the decision, particularly with regard to rights of creditors against the company of origin.<sup>10</sup> More specifically, the creation of the fund must be taken by the board of directors of the company concerned with the process, adhering to a requisite of 'absolute majority of its

members' and with a detailed resolution where some specific elements shall be indicated *de minimis*, such as the transaction to which the 'fund is dedicated'.<sup>11</sup> The by-laws may set forth rules requiring different procedures (e.g., a resolution adopted by the absolute majority of the board of directors or the additional approval granted by the ordinary or extraordinary shareholders' meeting), although the provisions of the code must be deemed as a 'floor' of requirements rather than the 'cap', therefore the adoption of a criterion based merely on an ordinary resolution by the board of directors according to its majority shall not be derogated by any by-law.

Remarkably, the creation of a separate fund within a company does not eclipse, replace or abolish the specific provisions in terms of demerger still existing under Italian corporate law, despite the novelty, according to the entrenched provisions of the same ICC.<sup>12</sup> However, the two phenomena are different, as the result of the demerger is the creation of two (or more) companies, whereas the 'remainder' of the separation of fund is just one company plus a

*incorporation, and [conversely] it is hooked up, in an extremely misleading way, to a proper company. In my view, this approach, which derives from a blind and narrow-minded theory concerned with the separate funds, has mainly got the fault to ignore the circumstance that we are dealing with a business activity).*

- 7 It is important to stress that, from a legislative point of view, two similar concepts have been created by the reform: (i) that of the separate fund legislated by Art. 2447-bis(a) which is the subject matter of this analysis; (ii) that of Art. 2447-bis(b), according to which:

*"A company may stipulate that in the loan agreement relating to the financing of a specific transaction the proceeds of such transaction, or part of such proceeds, be dedicated to the reimbursement, wholly or in part, of the loan itself."*

Technically speaking, the second form does not give rise to 'separate funds', rather it impinges on the acknowledgement, by the Italian legislation, that in specific circumstances, financing granted to a company for a specific project may be isolated and reserved, in terms of proceeds arising out of the project, to the relevant lender, who will therefore take priority over the general pool of creditors of the company. In this respect, what is ultimately provided by the Italian legislator is a sort of legislative recognition of the contractual techniques of the project financing (M Lamandini, 'I Patrimoni "Destinati" nell'EsperienzaSocietaria. Prime Note sulD.Lgs. 17 Gennaio 2003, n. 6' (n 6) 490,506). To further elaborate, according to the fundamental 'philosophy' underpinning Italian bankruptcy legislation, the concept *sub* (b) of Art. 2447-bis, as opposed to the one *sub* (a) of the same article, shall be deemed as an 'estate' and therefore a handful of assets and/or juristic acts, autonomously governed by Art. 72-ter of the Italian insolvency law in cases where the company itself were adjudicated bankrupt. An in-depth analysis of this provision can be read in M Fabiani, *DirittoFallimentare. Un Profilo Organico* (Zanichelli Editore 2011) 545, as well as in C Comporti, 'Commentary to art. 72-ter' in A Nigro and M Sandulli (eds), *La Riforma della Legge Fallimentare* (G Giappichelli Editore 2007) 438, 448.

- 8 The limit of the 10% of the assets of the company of origin has been criticized on some occasions (Borsa Italiana, 'Nota Tecnica sui Patrimoni Separati' [2002] Rivista delle Società 1588,1591). To elaborate, it has been pointed out that, from an operational point of view, this legal device, if subject to this threshold, will result in being deemed unpalatable among the businesses. In fact, it seems to be implied in this choice of the Italian legislator that a company is entrusted with a major activity (that destined to remain vested with the company also after the segregation) and, alongside this, small micro businesses, which shall be able to 'migrate' to the separate funds, within the threshold of the 10%. In reality, there might be corporations where the activities carried out are dual, and where the two are evenly balanced in terms of assets of the company (e.g., 50%). This company will be prevented, de facto, from using the segregation, for the reason that one of the two activities to be segregated shall exceed the threshold of the 10%. On the same point (the threshold), it is also correctly emphasized that the legislator has never clarified whether the 10% applies exclusively at the moment of the creation of the separate funds by the company, or whether it must apply also to the part of the assets provided by third parties (the contribution of third parties being also possible under Art. 2447-bis of the ICC). See M Lamandini, 'I Patrimoni "Destinati" nell'EsperienzaSocietaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6' (n 6) 490,506, particularly 503.
- 9 E.g., the banking activity is a reserved activity, whose exercise is subject to the previous authorization of the Bank of Italy; therefore, a company not being a bank will be prevented from setting up funds to carry out banking transactions or business, as this would succeed in getting round the special authorizations established by law for that activity.

- 10 See later under this same paragraph.

- 11 The relevant law provision (Art. 2447-ter of the ICC) is worthy of being paraphrased.

*"A resolution which dedicates a fund to a specific transaction [...] shall indicate:*

- (a) *the transaction to which the fund is dedicated;*
- (b) *the assets and legal relations included in such a fund;*
- (c) *the business plan showing that the fund is suitable for the performance of the transaction;*
- (d) *the terms and rules relating to the use of the fund, the result which is intended to be achieved and suretyship, if any, offered to third parties;*
- (e) *the contributions, if any, of third parties, the procedure for monitoring the management and distributing the proceeds of the transaction;*
- (f) *whether it is possible to issue financial instruments for participating in the transaction, with the specific indication of the rights conferred by such instruments;*
- (g) *the appointment of an auditing firm for monitoring the accounts regarding the progress of the transaction, in case the company is not already subject to auditing and issues securities in its assets, significantly distributed among the public and offered to non-professional investors;*
- (h) *rules for reporting on the specific transaction."*

- 12 The *scissione* (demerger) is a phenomenon legislated under Art. 2506/2506-quater of the ICC. As observed doctrinally (V Buonocore, *Manuale di DirittoCommerciale* (GGiappichelliEditore 2009) 501), the original framework of the ICC did not arrange for specific law provisions in this matter; in fact, the relevant provisions were merely



fund, the latter not being properly an entity, rather – at least in the way the Italian legislation conceived the matter – merely assets managed by the main body from which it originates. A question seems to arise quite logically, after briefly describing the separation of fund process, concerning the consequences the creditors of the company may face as a result of it. To simplify, the following scenario could constitute a possible trick: at  $t_1$  third parties have lent money to the company, by relying on a creditworthiness based on a certain amount of assets. At  $t_2$  the company-borrower enucleates a separate fund, thereby reducing its own assets. At  $t_3$  the creditors of the company may be compelled to realize that their potential claims have been affected in the interim, as the assets to be enforced in case of default of the borrower are no longer the 100% they relied upon at  $t_1$  but rather, theoretically, just 90% of them.<sup>13</sup> Therefore the creditworthiness of the borrower has resulted in being compromised to the tune of at least 10%. In this respect, a possible safeguard is given to the creditors by a norm, set out under Article 2447-*quater* of the ICC, heading ‘Publicity of constitution of a dedicated fund’. Such a law provision stipulates that *the resolution [whereby the company adopts the separation of a fund] shall be deposited and registered pursuant to Article 2436 [of the ICC]*. Incidentally, the provision recalled (2436) puts in place and creates a regime of publicity aimed to protect any third party which might have contracted with the company, by giving publicity to the main phenomena occur transpiring during the life of the corporate entity. As far as the separation of assets is concerned, the publicity is conducive and somehow connected to the rights that the creditors may exercise, to file an opposition against the resolution of creation of the fund, within a limit of sixty days from the registration of it (Article 2447-*quater*(2)).<sup>14</sup> The opposition is thus in a position to paralyse the process, thereby preventing the company from implementing the resolution whereby up to 10% of its assets have been separated. However, the court, according to the last limb of Article 2447-*quater* of the ICC, *notwithstanding such opposition, may order that the resolution be put into effect, subject to posting of a suitable security by the company*.

Remarkably and in all likelihood, controversially, in lack of this opposition or if such an opposition has been rejected judicially anyway, the resolution shall definitely take effect and its purpose is that *the company’s creditors may not enforce any right [...] on a fund*

*dedicated to a specific transaction, except for the part thereof belonging to the company*. (Article 2447-*quinquies*(1) of the ICC).<sup>15</sup> In this respect, it is worth noting that the technicality of the rules at stake is the same as that adopted to legislate in the matter of the demerger, given the ontological similarities of the phenomenon. A pivotal rule existing for the demerger has been omitted, that being the rule prescribing that for the debts which have arisen before the demerger the responsibility lies on the spin-off company, within the limits of the assets transferred.<sup>16</sup> The result of a black letter interpretation of the norm at stake would be paradoxical: the creditors of the company are deprived of up to 10% of the assets of their debtor in case of creation of separate fund, with more dire consequences lying in wait than the similar phenomenon of the demerger. Indeed, a potential ‘safe-belt’ could be fashioned by a more loose interpretation of the norm at stake, that is to say, the creditors of the company, for the purposes of this specific article, must be deemed exclusively to be those who have become such after the separation has taken place, whereas those before the law provisions in the matter of the demerger should apply by analogy.<sup>17</sup> Beyond this, it is incomprehensible that the Italian legislator, in so crucial a matter, has failed to arrange for a clear set of rules; the same need for calling upon an application by analogy of rules existing in similar corporate transactions (in this case the demerger) may be the paradigm culpable for the several flaws affecting this area.

The board of directors of the company of origin, albeit overseeing the separate fund as well, must ensure that a demarcation line is clearly drawn vis-à-vis the contracting parties, to avoid any promiscuity between the separate assets and those of the company in the management of the company.<sup>18</sup> This is spelled out under Article 2447-*septies*(1), where it is stated as follows:

*‘Assets and relations included in dedicated funds [according to the ICC as amended] are separately indicated in the company’s balance sheet. Directors draw up a separate statement of account for each dedicated fund and attach it to the company’s accounts, as provided by Articles 2423 et seq.’*

Also, in light of the rarity of this form of practice, there is no precedent to affirm whether the legislation, in this point, is sufficiently clear.

derived, *mutatis mutandis*, from those in the matter of merger. However, as a result of the Legislative Decree 16 Jan. 1991, no 22, the ICC in this area has been reformed, so that the merger has been redefined and the demerger has been given an ad hoc set of law provisions.

13 In any case, no less that this amount, given the fact the legislation established a threshold of 10% for the separation.

14 For commentaries on this specific system of publicity envisaged for the separate funds, see C Ibba, ‘La Pubblicità del Patrimonio Destinato’ (2007) I Giurisprudenza Commerciale 725,738; D Scarpa, ‘La Rappresentazione Contabile del Patrimonio Destinato e la Tutela dei Creditori Particolari’ (2008) I Giurisprudenza Commerciale 400, 415.

15 Namely:

*“After the lapse of the time limit [of 90 days provided by art. 2447-*quater*(2)], company’s creditors may not enforce any right either on a fund dedicated to a specific transaction or on results deriving from such fund, except for the part thereof belonging to the company.”*

16 Article 2506-*quater* of the ICC. In light of this, there should have been a norm, in the matter of the separate fund, according to which, as for the debts of the company of origin which arose before the segregation, the company itself should have been deemed liable for within the limit of the transferred assets.

17 This has been suggested initially, at doctrinal level, by M Lamandini, ‘I Patrimoni “Destinati” nell’EsperienzaSocietaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6’ (n 6) 502.

18 D Scarpa, ‘Inizio e Fine del Patrimonio Destinataro tra Adeguatezza e Responsabilità (2009) I Giurisprudenza Commerciale 1041, 1055.



### 3. THE RELATIONSHIP BETWEEN SEPARATION OF THE ASSETS AND TRUST

Interestingly, Italy is already part of the Convention of Hague on the Trust (XI Convention) signed on 1 July 1985, and the trust has been clearly recognized and accepted by the relevant signatories of that framework, including Italy, as the main form of separation of assets.<sup>19</sup> Based on this, the trust, once adopted by a legal system, becomes the general concept to which ad hoc separations of assets possibly envisaged in that jurisdiction must be aligned.<sup>20</sup> Incidentally and remarkably, for the purposes of what is explained below in this paragraph, the trust is a legal device permitted to both individuals and corporations, given its nature of general principle disciplining any form of segregation and separation. That being said, the separation of assets introduced for the Italian corporations becomes, ontologically, a separation within the separation; in essence, a corporation, in itself, already conceptually accounts for a form of segregation of the assets, as the creditors of that company may enforce exclusively the assets of the debtor (the company), rather than those of the members of that company. As a result of the separation of the assets under Article 2447-bis of the ICC, in comparatively recent times for Italian companies, what conceptually emerges and legislatively materializes is a phenomenon of ‘segregation of the segregation’: the creditors of the company, already prevented from enforcing the assets of the members of the company (because of the ‘first degree segregation’),<sup>21</sup> are further hindered from raising claims against the part of the (segregated) assets of the same company which may have been additionally isolated, albeit within the limits of 10% (the ‘second degree segregation’), because of the opportunities ushered in by the ICC.<sup>22</sup> However, if the above is to be accepted, so must the following question be logically answered: if the separation of the assets would ‘look like’ the concept of the trust, as recognized

doctrinally and in keeping with the wishes of the Italian legislator,<sup>23</sup> and if the trust is a concept already established in that jurisprudence, how is it that the legislator decided to create a further segregation exclusively for the companies, incidentally with a micro-system of rules which in some cases may also give rise to inextricable problems of interaction with other concepts of the corporate law discipline?<sup>24</sup> Almost a decade into the life of this new concept (the separation of assets), few commentators have correctly alluded to the peculiarities and contradictions to which the phenomenon may give rise,<sup>25</sup> although the vast majority of the Italian jurists seem inclined to linger on a sort of enthusiastic but superficial acceptance of this, vindicated – erroneously, as hopefully demonstrated in this work – by the idea that the concept would be a ‘derivative’ of the trust (but it is not!) and that it is recognized in the Anglo-Saxon world (an even more outrageous statement!).

### 4. THE RATIONALE BEHIND THE FUND AND DOCTRINAL STANCES

In critically analysing the essence of the ‘separate fund’, which an Italian company is entitled to establish according to the company legislation of that jurisdiction, passed nearly a decade ago, some troublesome legal aspects may be worthy of legal analysis and further deliberation, of both a theoretical and empirical nature. First and foremost, as it seems that the fund is indeed in a position to carry out the specific transaction for which it has been created, the liabilities originating from it (and after its constitution) are not liabilities of the company of origin, but rather autonomous liabilities. In this respect, it proves difficult to grasp any rationale ‘lurking’ behind the decision of the Italian legislator to introduce this concept. In fact, if the legislator wanted to allow a company to focus on a specific business, the appropriate law device was already

19 Italy implemented the Hague Convention with Law 16 Oct. 1989, no 364. Among commentators in the Italian literature, who embarked on an analysis of this topic, see P Gabriele, ‘Dall’Unità alla Segmentazione del Patrimonio: Forme e Prospettive’ (2010) I *Giurisprudenza Commerciale* 593,628.

20 M Lamandini, ‘I Patrimoni “Destinati” nell’Esperienza Societaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6’ (n 6) 490,506, particularly 491, 492.

21 In Britain, the doctrine of the ‘corporate veil’ was consolidated as early as *Salomon v. Salomon & Co Ltd* [1897] AC 22. See, among the Others: PL Davies, *Gower and Davies Principles of Modern Company Law* passim 33, 37 (8th ed., Thomson/Sweet & Maxwell 2008); PL Davies, *Introduction to Company Law* 31, 52 (2d ed., Oxford U. Press 2010); N Bourne, *Bourne on Company Law* 15, 49 (5th ed., Routledge 2011); J Lowry & A Reisberg, *Pettet’s Company Law* 31, 38 (3d ed., Pearson Longman 2009). With reference to the British legislation within the specific and ‘peculiar’ Scottish jurisdiction, see N Grier, *Company Law* 24, 43 (3d ed., W. Green 2009); J Bisacre & C McFadzean, *Company Law* passim, particularly 31, 44 (Dundee U. Press 2012).

Conversely, in Italy the principle of segregation is legislated under Art. 2325 c.c. For a focus on the extent of this law provision encompassed by the ICC, see L Ardizzone, ‘Commentary to art. 2325’ in PG Marchetti (ed), *Commentario alla Riforma delle Società* (Egea 2007) 3,28; P Abbadesse, ‘Commentary to art. 2325’ in G Nicolini and A StangoD’Alcontres (eds), *Società di Capitali, Commentario*, volI (JoveneEditore 2004)1,7; PMontalenti, ‘Commentary to art. 2325’ in G Cottino (ed), *Il Nuovo Diritto Societario. Commentario*, vol I (Zanichelli Editore, 2004) 25,31; M Granatiero, ‘Commentary to art. 2325’ in A Maffei Alberti (ed), *Il Nuovo Diritto delle Società*, volI (Cedam 2005) 1,14. Similarly to common law, in the Italian jurisdiction the principle of segregation is deeply tied up to that of “corporate persona” (see, *amplius*, A Gambino, ‘Limitazione di responsabilità, personalità giuridica e gestione societaria’ in P Abbadesse and GB Portale (eds), *Il Nuovo Diritto delle Società. Liber Amicorum Gian Franco Campobasso* (Utet 2007) 43.

22 M Lamandini, ‘I Patrimoni “Destinati” nell’Esperienza Societaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6’ (n 6) 491.

23 M Lamandini, *ibid.*, 495. This A. correctly affirms as follows:

“La prossimità tipologica con il trust è [...] spiccata nell’ipotesi dei “patrimoni destinati ad uno specifico affare” previsti nella nuova sezione XI, e così negli art. 2447-bis/novies i quali realizzano [...] non già una ipotesi di separazione contabile bensì una vera segregazione patrimoniale.” (ie the ontological proximity to the trust is [...] so obvious in the notion of “assets dedicated to a specific business” set forth under the new section XI [of the Italian Civil Code], and therefore within articles 2447-bis through 2447-novies, whose law provisions aim not simply at a separation of the financial books, rather at a proper segregation of assets).

24 In this respect, see *amplius* the analysis under para. 4 as well as the conclusions.

25 M Lamandini, ‘I Patrimoni “Destinati” nell’Esperienza Societaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6’ (n 6) 490,506. Despite the critique of a few such writers, the several problematic aspects entailed in the phenomenology of the concept wholly considered, have never been fully explored and identified later by the Italian Scholars.

at hand, courtesy of the setting up of a subsidiary, and through the allocation of specific recourses.<sup>26</sup> Similarly, as has been subjected to much debate above,<sup>27</sup> the trust as a concept has already been implemented and absorbed in Italy, and is open to both corporations and individuals, this meaning that a segregation of the segregation of the company was in all likelihood unnecessary.

Second, and also as a result of the previous observation, it is even obvious to note that any new entity (a proper corporate entity, not a separate fund) whose interests are held by a mother company is thus capable of operating more transparently vis-à-vis the universe of the business (particularly the creditors); in fact third parties shall contract with the board of directors of the corporation, and that corporate body is clearly identifiable as that relating to the company. Conversely, from an operational point of view and as far as the separate fund is concerned, it seems to be odd to say the least, that a legislative body (the Italian one) has in comparatively recent times permitted a (sort of) entity to operate, with full autonomy in terms of liabilities, through an 'agent' that is not its own, but rather that of a different entity (the company who separated the fund), in sort of 'borrowing' of corporate bodies from one entity (the company of origin and the new separate fund) in convolution of roles worthy of the most acclaimed Neapolitan comedies.<sup>28</sup>

Third, doctrinally, it has been affirmed<sup>29</sup> that the separate fund aims, in a direct way, to allow for participation in a specific

transaction of specific stakeholders, such as banks and financial institutions, interested in financing a specific activity of the company, rather than the entire business. However, in this respect, it is also added that, in so far as the new discipline replicates, as it does indeed, the model of the constitution of the company – responsibilities, corporate governance, accounting books<sup>30</sup> – it proves difficult to ascertain a proper function in the concept.<sup>31</sup> *Quod erat demonstrandum*: in an area like company law where theoretical analysis and empirical evidence walk hand-in-hand, a previous analysis on how a concept is perceived by the business would have been necessary; a concept like the separation of assets, which de facto already existed in the jurisprudence of that country (Italy) via the trust would have been probably totally unnecessary, also in light of the conceptual difficulties which emanate from it, such as the convolution of the two concepts (the segregation of the segregation) and its intrinsic contraction in terms.

In terms of bankruptcy, albeit merely hinted in this work,<sup>32</sup> the interplay between company law provisions with regard to the new concept of the 'corporate fund' and the insolvency legislation has already engendered inextricable issues in this matter.<sup>33</sup> In legislation such as the Italian, notoriously overwhelmed by rules, the introduction of this new concept should have been better meditated, particularly in accounting for the consequential impact on the insolvency legislation. Ten years have lapsed since the origin

26 Conversely, in the beginning, the Italian Scholars were infatuated by the new concept of a separate fund, because of its Anglo-Saxon allure, in contrast with the possibility to create a further company. It was said (G Olivieri, G Presti and F Vella, *Il Nuovo Diritto delle Società e Cooperative* (Il Mulino 2003) 59) as follows:

*“La costituzione di un diverso soggetto giuridico, peraltro, può risultare un inutile e costoso artificio al solo fine di isolare sotto il profilo patrimoniale i risultati economici di un determinato affare o consentire la partecipazione di terzi allo stesso. La scelta di creare una diversa società risulta coerente nel caso in cui si intenda dar luogo ad una forma complessa di organizzazione dell'attività come quella dei gruppi.”* (i.e. the creation of a different subject may result in a useless and expensive trick whose only purpose is either to isolate from an accounting perspective the economic outcome of a specific business or to allow the participation of third parties in it. The choice to create a different corporate entity is consistent in cases where one would be willing to set up a complex form of organization of the activities such as the group of companies).

In reality, it can be objected that in the Anglo-Saxon world, such as in the British corporate legislation, the option introduced by the Italian legislator has never existed and, if a company wants to 'separate' its own assets in order to focus on a specific one and/or get the separate activities financed ad hoc by financial institutions, what usually is put in place is merely – and more simply – the constitution of a different company.

27 See specifically *supra* para. 3.

28 Conceptually, the oddity is perceived with clarity and with anticipation by M Lamandini, 'I Patrimoni "Destinati" nell'EsperienzaSocietaria. Prime Note sul D.Lgs. 17 Gennaio 2003, n. 6' (n 6) 491.

The Author, in lambasting the choice adopted by the Italian legislator, proposes that, probably, in an ideal world, to avoid confusion, an ad hoc agent, therefore specific 'independent directors' (*gestori indipendenti*), should have been appointed.

29 Among the others, see G Olivieri, G Presti and F Vella, *Il Nuovo Diritto delle Società di Capitali e Cooperative* (n 26) 59,60.

30 Different conclusions, however, could be inferred from the different but similar concept of loan agreement relating to the financing of a specific transaction, according to the definition of Art. 2447-bis(b) (see previous footnote [...]).

31 G Olivieri, G Presti and F Vella, *Il Nuovo Diritto delle Società di Capitali e Cooperative* (n 26) 60. Namely, it is affirmed as follows:

*“Va notato [...] che nei limiti in cui la nuova disciplina, nella definizione del primo modello di “patrimonio destinato”, riproduce tutti gli elementi tipici della costituzione di società – quali la responsabilità, le modalità di gestione, la contabilità del patrimonio separato – e prevede la partecipazione di terzi all'affare come un fatto solo eventuale appare difficile rintracciare correttamente la funzione dell'istituto.”* (it must be noted that, so long as the new discipline, as regards the first limb of the 'separation of assets', blends and assembles all the features typical of the incorporation of a company – such as responsibilities, corporate governance, accounting – and states the participation of third parties to the business concerned, it is difficult to find out and retrieve the purposes of such a concept).

32 See also *supra* n. 6.

33 Albeit partly extraneous to the current work, it is worth mentioning that, on the one hand, some Authors (F D'Alessandro, 'PatrimoniSeparati e VincoliComunitari' [2004] *Le Società* 1061,1063; N Rocco di Torrepadula, 'PatrimoniDestinati e Insolvenza' (2004) *I GiurisprudenzaCommerciale* 40,60; B Meoli, 'PatrimoniDestinati e Insolvenza' [2005] *Il Fallimento* 113,120; S Vincere, 'PatrimoniDestinati e Fallimento' [2005] *GiurisprudenzaCommerciale* 126,145) had maintained that the separate fund could have been adjudicated bankrupt in an autonomous manner, as the two insolvencies (companies and fund) are basically different. On the other hand, the prevailing theory (M Menicucci, 'Patrimoni e FinanziamentiDestinati: Responsabilità e Tuteladei creditori e dei Terzi' (2005) *I GiurisprudenzaCommerciale* 210, 236, particularly 228; S Bonfatti and PF Censoni, *Manuale di DirittoFallimentare* (Cedam 2004) 182) tended to advocate that, by itself, the insolvency of the company would not give rise to the cessation of the business, but simply the application of the rules of Art. 2447 and following of the ICC. More recently, to confirm that the separate fund cannot be adjudicated insolvent, as already

of the concept of the separate assets – five of which were sadly dedicated to both merely adjusting the equilibrium and addressing the contradiction of the law provisions originally introduced, spoiled by the presence of flaws and loopholes.

5. CONCLUSIONS

The discussion conducted, by way of deliberations over a new concept within the Italian corporate legislation (the separation of assets), almost ten years on from its introduction, would appear to have come to a decidedly sceptical conclusion. First, from a legislative point of view, the analysis has in all likelihood succeeded in clarifying that this concept was not necessary; the customary means of doing business for a company (the set-up of a subsidiary) already existed in that jurisdiction, as it does in the generally regarded developed corporate legislations across the world. ‘The silence is golden’, wisdom would appear to have gone unheeded by the Italian jurisdiction in this matter. Second, doctrinally, the manner in which Italian jurists (at least those who saw and still see in it a mysterious fascination and appeal) have strenuously justified the concept, seems to be arguable; the trust, as a possible ‘comparator’ at international level in which this novelty should find a substantiation, does not fully convince and it is probably a conceptual blunder these commentators have made in shaping the conceptual niche of the separate fund. From an

international point of view, a lesson can probably be learned from subjecting the ‘Italian job’ to such analysis. Law provisions, particularly in the matter of business law, must originate from jurists, in the pivotal role they play in engendering support for the legislative power; however, teleologically, the goal of a legislative corpus is to discipline a specific area of the business with transparency. Ultimately, the beneficiaries of these rules are those who have to apply them, such as businesses. Conversely, the rules moulded ten years ago, albeit certainly generated by jurists in their genesis, have entirely been stripped of their ‘azimuth’ in their finalities. At the end of the day, as demonstrated in this work, the business community would continue unabated to ignore the ‘rationale behind’ the new concept and also would find the relevant rules laboriously complex and, in all likelihood, complicated and contradictory. Not rules for the business, as it should be in the area of business law, but rather rules from jurists to fulfil the intellectual satisfaction and the attitude to the exegesis of a cast of local jurists, for the sake of it but with a total disarticulation from the business reality. Encapsulated in a motto, this could be defined as law for law itself and lawyers. In keeping with the assertion that lawyers should all be killed, is it plausible to infer that the seed of this Shakespearean motto had been planted by observing the future Italian lawyers orchestrate a series of ephemeral and useless legislation? At least, in looking at the ‘film’ just narrated of the separation of assets, the answer could be yes!

‘unravelling’ by the second school of thought mentioned above, some additional provisions have been inserted at a later point within the framework of the ICC, in force of Art. 20 of Legislative Decree 28 Dec. 2004, no. 310. As a result of this, it has been clearly legislated that it is ‘prohibited that the separate fund may be adjudicated insolvent and adjudicated bankrupt autonomously in comparison with the company which has been established’, as stated by the new wording of the amended art. 2447-novies.

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